

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001054-WC

PARCO CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-89703

MITCHELL PENNINGTON;
HON. ANDREW F. MANNO,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2006-CA-001122-WC

MITCHELL PENNINGTON

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-89703

PARCO CONSTRUCTION;
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CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Parco Construction petitions us to review an opinion of the Workers' Compensation Board (Board) entered on April 7, 2006; Mitchell Pennington cross-petitions us to review the same opinion. In the April 7, 2006, opinion, the Board affirmed the Administrative Law Judge's (ALJ) decision that Pennington suffered no permanent disability from his psychological condition but awarded Pennington past and future medical expenses for the psychological condition. We affirm.

While in the employ of Parco, Pennington suffered a work-related injury to his back. Pennington filed a claim for workers' compensation benefits. Therein, Pennington alleged to have suffered a work-related physical injury to his back and, as a result, suffered depression and anxiety. The ALJ ultimately awarded Pennington a permanent partial disability award of 13% with application of the 3.2 multiplier as a result of the back injury. As to his psychological condition, the ALJ found Pennington failed to prove a permanent impairment, but was entitled to an award of past and future medical benefits. Being unsatisfied with the ALJ's award, Parco and Pennington sought

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

review with the Board. The Board affirmed the ALJ's decision on April 7, 2006. This review and cross-review follow.

In its petition, Parco contends the ALJ erred in awarding future medical benefits for Pennington's psychological condition. Specifically, Parco argues Pennington was not entitled to an award of future medical benefits because he failed to prove permanent impairment. Simply put, Parco contends that future medical benefits are available only where the claimant suffered a permanent disabling injury.

Parco argues Kentucky Revised Statutes (KRS) 342.020(1) clearly states that a claimant is entitled to medical benefits "at the time of the injury and thereafter during disability." Parco cites to the 1996 amendment to KRS 342.0011(11). In 1996, Parco maintains the legislature amended the statute to specifically define disability as "'temporary total disability,' 'permanent partial disability' and 'permanent total disability.'" Parco's Brief at 6. As Pennington failed to prove a permanent disabling injury, Parco contends that Pennington's psychological condition does not meet the definition of disability as found in KRS 342.0011(11); thus, future medical expenses are not recoverable. We disagree.

It is been a long-standing rule that a claimant may receive past and future medical expenses for a non-permanent disabling injury. Cavin v. Lake Constr. Co., 451 S.W.2d 159

(Ky. 1970). The 1996 amendment to KRS 342.020(1) does not expressly condition a claimant's right to receive past and future medical benefits upon a permanent disabling injury. Without such a clearly expressed condition, we will not imply one. Thus, we reject Parco's claim that Pennington was not entitled to an award of future medical benefits as a result of his psychological condition.

In his cross-petition, Pennington argues the ALJ erred by failing to find his psychological condition to be permanently disabling. Pennington points to the opinions of Dr. Andrew Cooley and Dr. Tracy Eells. Pennington claims that both physicians assessed a 10% permanent impairment rating as a result of his psychological condition.

As fact-finder, the ALJ has the sole providence to judge the weight and credibility of evidence. Leeco, Inc. v. Adams, 920 S.W.2d 84 (Ky.App. 1996). Where the claimant was unsuccessful before the ALJ on appeal, he must show that the evidence in his favor was so compelling that no reasonable person could have failed to be persuaded by it. Carnes v. Termco Mfg. Co., 30 S.W.3d 172 (Ky. 2000).

In the case at hand, the record indicates that Dr. Cooley and Dr. Eells did assess a 10% impairment rating to Pennington for his psychological condition. Because Pennington had not received treatment for the psychological condition, Dr.

Cooley and Dr. Eells opined that the 10% impairment rating could not be considered permanent. The evidence amply supports the ALJ's finding that Pennington did not suffer a permanent disabling injury as a result of his psychological condition.

Pennington alternatively claims the ALJ erred by failing to "abate" the claim until Pennington received the necessary treatment for the psychological condition and reached maximum medical improvement. In considering this argument, the Board concluded:

As to Pennington's alternative argument requesting abatement until such time as he reaches MMI following the necessary psychological treatment, we see no reason the ALJ was compelled to grant such relief. The record is devoid of any evidence indicating that Pennington is currently temporarily totally disabled as a result of his work-related mental condition. To the contrary, Dr. Cooley stated that from a psychiatric standpoint he saw no reason that Pennington could not perform any job for which he has training and experience. For that reason, despite the fact that Pennington may not yet be at MMI from a psychiatric/psychological standpoint, we find nothing that would obligated[sic] the ALJ to abate that portion of the claim or take any action other than to award medical benefits with respect to that aspect of the case. That is exactly what the ALJ did in this instance.

We agree with the Board's reasoning and, likewise, conclude the ALJ did not err in failing to abate Pennington's claim.

For the foregoing reasons, the decision of the
Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS-APPELLE:

Rodney J. Mayer
U'SELLIS & KITCHEN, PSC
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Christopher P. Evensen
COTTON & EVENSEN PLLC
Louisville, Kentucky